IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 3RD JANUARY 2007 / 13TH PAUSHA 1928

CRL.A.No. 1581 of 2006(C)

SC.398/2005 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

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APPELLANT: RESPONDENT

SAMBASIVAN, S/O.KUTTAN NAIR,
C.NO.3658, CENTRAL PRISON, KANNUR.

BY ADV. ADV.P.V.VIJAYAKUMAR(STATE BRIEF)

RESPONDENTS: COMPLAINANT

STATE OF KERALA, A.S.I. OF POLICE,
SULTHA BATHERY POLICE STATION, C.R.NO.391/04.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No. 1581 OF 2006-C

Dated this the 3rd day of January, 2007.

JUDGMENT

The appellant, accused in S.C.No.398/2005 on the file of the Additional Sessions Judge (Adhoc)II, Kalpetta, faced trial for the offences punishable under Sections 55(b),(g) and 58 of the Abkari Act on the allegation that he was found in distilling illicit arrack and also in possession of 5.5 liters of arrack on 24.8.2004 and thereby committed the above offences. To prove the prosecution allegation, prosecution examined PWs 1 to 8 and relied on Exts.P1 to P7. MOs 1 to 6 were also produced. On closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. The appellant denied the entire prosecution and had stated that he is innocent and he was at Coorg and when he came back from Coorg on 4.10.2005, he was arrested by the police. Relying on the evidence adduced by the prosecution, the trial court found the appellant guilty under Sections 55(b) and (g) of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for five

years and to pay a fine of Rupees One Lakh with default sentence of payment of fine, further simple imprisonment for a period of six months more. The trial court also allowed the benefit of Section 428 of the Cr.P.C to the appellant. The conviction and sentence awarded against the appellant are assailed in the appeal.

2. Since the appeal is filed through the jail authorities and the appellant is not defended by any counsel of his own choice, a member from the State brief panel has been appointed to argue the appeal for and on behalf of the appellant. This Court heard the learned counsel appearing for the appellant as well as the Public Prosecutor. The counsel appearing for the appellant had taken two contentions specifically before this Court in challenging the judgment of the trial court. Firstly, the counsel submits that the trial court miserably failed to note that the prosecution has not succeeded in proving the identity of the appellant as the person responsible for keeping the contraband article. Secondly, the learned counsel submits that the evidence of the prosecution witnesses cannot be relied on to prove that the

shed from which the contraband article alleged to have been seized by the police belongs to the appellant and the appellant is in exclusive possession of the shed and he is residing in that shed. The prosecution tried to prove the case against the appellant relying on the evidence of Pws 1, 2,4 and 7 with regard to seizure of the contraband article from the shed. PW7 is the detecting officer, who had deposed before the court that on 24.8.2004 while himself, PW4 and other police officers were returning from attending a public programme, he received a reliable information that the appellant is distilling arrack in the house at Aarthavayal in Cheeral amsom and on receiving such an information, PW7 and other officers went near the house and when they reached the house, they have seen that somebody was running out of the house through a nearby lane and as informed by the witness, who had already accompanied him, PW7 identified the person jumped out of the house was the appellant. This witness has further stated that himself and the police party along with Pws 1 and 2 went to the shed on preparing a search memo to search the house and sending the same to the court, PW7 and the other police officials along with the witnesses went

inside the shed. It was seen that, in the kitchen room of the shed an aluminum pot was on the hearth and two aluminum vessels were also on the pot and a pipe was also connected with the aluminum pot. It was seen on further verification that the aluminum pot contained wash for preparing arrack and a black can was kept near by the hearth. On further verification, it was seen that the can contained 5.5 liters of arrack. This witness has further stated that on preparing Ext.P1 seizure mahazar, he had seized the aluminum pot and other vessels and had also taken sample from the arrack kept in the can in the presence of the witnesses. Further this witnesses has stated that he had labeled and sealed the sample as well as the contraband article and thereafter came to the police station and registered Crime No.381/2004 of Sulthanbattery Police Station. This witness had further deposed that the sample taken from the contraband article and the material objects were produced before the court on 26.8.2004. This witness has further stated that investigation of the case has been continued by Pws 6 and 8 and finally charge has been laid against the appellant by PW8. The evidence of this witness, with regard to the seizure of the

material objects and taking of the sample, has been supported by the evidence of PW4. PW4, the head constable, who accompanied PW7 while the crime was detected, had given evidence before the court that himself and PW7 along with PW1 and 2 went near the shed where he had seen that somebody running out of the house and the witnesses accompanied them had stated that the person running out of the house was the appellant. This witness also had stated that PW7 had prepared Ext.P1 seizure mahazar and seized the contraband article and also taken the sample. PW1, an independent witness who accompanied PW7 while they were going to the house of the appellant, had deposed before the court that he had gone along with PW7 and PW4 to the house of the appellant and he had seen that PW7 had prepared Ext.P1 seizure mahazar and had seized the contraband article and had taken the sample from the arrack contained in the can. He had further stated that when they reached the kitchen of the shed from which the contraband articles were seized, MOs were already in the shed. He had also stated that he knows the appellant and the shed belongs to the appellant. Though PW2 was examined to support the

prosecution case, he turned hostile and had stated that he had not seen anything seized by PW7 from the shed as alleged by the prosecution., however, he had stated that the appellant was residing in the shed. PW3 was examined to prove Ext.P2 scene mahazar prepared by PW5. PW5 is the Village Officer, who had given Ext.P3 certificate of possession of the property in which the shed is situated. PW5 had stated that as per Ext.P3 certificate issued by him the property in which the shed situated is jointly owned by the children of one Yesodha Nangiar including the appellant. PW6 and 8 are the police officers, who completed the investigation and filed the charge. Exhibit P4 is the chemical certificate produced by PW6 which would show that the sample contained ethyl alcohol at 37.88% and 2.54% by volume.

3. The question to be decided in this appeal is whether the findings entered by the trial court are sustainable or not. The contention of the learned counsel appearing for the appellant is that the trial court went wrong in accepting the prosecution evidence regarding the identity of the appellant, who was responsible for keeping MOs 1 to 6 in the shed.

To decide this question it has to be analysed that whether Pws 1,2,4 and 7 have given evidence to show that the appellant was the person, who jumped out of the shed when they reached near the shed. When PW4 and 7 were examined before the Court they had only stated that they have been told by the other witness that the person gone out of the house was the appellant. But they have no previous acquaintance with the appellant at all. That apart, these witnesses have not stated that which witnesses, either examined by the prosecution or questioned by the officials, had told that the appellant was the person, who jumped out of the house when they reached near the house. PW1 or PW2 had also no case that they have identified the appellant as the person who jumped out of the house. The only evidence given by these witnesses before the court was that they had seen the appellant in the premise of the shed certain occasions and they were not sure whether the appellant was permanently residing in the house. Hence, the identity of the appellant as the person who responsible for keeping the material objects seized by PW6 is doubtful. That apart, it could be seen that when PW5 was examined before the court

he had only stated that the property in which the shed situated jointly belongs to the children of Yeshodha Nangiar and he had no case that there was any proof to show that the appellant was residing in the shed and the shed belongs to the appellant alone. That apart, it has to be noted that when Pws 1, 2,4 and 7 were cross examined by the counsel for the defendant, they have admitted that anybody can enter the shed and the shed was not properly protected by any door. It is also to be noted that while PW5 had prepared Ext.P2 scene mahazar, he had only stated that the shed contained two rooms and a coat was also iside the shed. In Ext.P2, PW5 had also given a discussion of the shed. But, it was stated that the shed does not contain any registration number or panchayath number. In the above circumstances, it could be seen that the prosecution has not proved that the shed from which the material objects recovered exclusively belongs to the appellant or exclusively in his possession. It was also come out in evidence that in the same compound in which the shed situated, the house of the sister of the appellant was situated and there were other residential houses also in clear vicinity of the shed. In the above circumstances, it is

the duty of the prosecution to prove that the shed from which the contraband article seized actually belongs to the appellant and the appellant was the person responsible for keeping the contraband article inside the shed as alleged by the prosecution. Hence, this Court is of the view that the reasonable conclusion cannot be arrived that the shed belongs to the appellant and the appellant is responsible for keeping the article seized by the police. In the above circumstances, benefit of doubt shall be given to the appellant.

Accordingly, the findings entered by the trial court are not based on any legal evidence. The judgment under appeal is set aside and the conviction and sentence awarded against the appellant are also liable to be set aside. The appeal is allowed. The appellant, accused in S.C.No.398/2005 on the file of the Additional Sessions Court, Kalpetta, is hereby acquitted and he shall be released forthwith, if he is not required to be kept in jail in connection with any other case.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.1581 OF 2006-C

JUDGMENT

3rd January, 2007.